

In the Matter of)
)
Implementation of Section 621(a)(1) of the Cable) MB Docket No. 05-311
Communications Policy Act of 1984 as amended)
by the Cable Television Consumer Protection and)
Competition Act of 1992)

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REPLY COMMENTS OF THE CITY OF HUNTSVILLE, ALABAMA

2 47 U.S.C. § 546(c)(1)(D).

this proceeding with respect to the need or authority for the FCC to adopt rules on the grant of new franchises,³ it is requested that the FCC consider the distinction in conditions that may affect a new entrant as opposed to an incumbent provider that has already built out, either in whole or in part, its system to serve a community and is already generating revenues from subscribers. In such situations, it is entirely reasonable and fully consistent with the Cable Act that incumbent operators seeking to renew their franchises be subject to the reasonable determinations of local franchising authorities ("LFAs") as to the best manner to meet the cable related needs of the local community. Such determinations are an inherently legislative function, and as such, are entitled to substantial deference.

See, Union CATV, Inc. v. City of Sturgis, Ky, 107 F.3rd 434 (6th Cir. 1997).⁴

³ Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, MB Docket No. 05-311, FCC 06-180 (rel. March 5, 2007). The *Report and Order* is currently subject to an appeal in federal court.

⁴ In *Sturgis* the U.S. Sixth Circuit Court of Appeals upheld a city's denial of a franchise renewal. In upholding the city's denial, the court held that it would not second-guess the cable-related needs and interests determined by the franchising authority through the renewal process. Particularly significant was the court's determination that the "granting of a cable franchise is a legislative act traditionally entitled to considerable deference from the judiciary." 107 F.3rd at 441. The court noted that a city council's "knowledge of the community give it an institutional advantage in identifying the community's cable needs and interests." *Id.* The court found that judicial review of "a municipality's identification of its cable-related needs and interests is very limited" and that a court should defer to the franchising authority's identification of the community's needs and interests except to the extent necessary to weigh the needs and interests against the cost of implementing them. *Id.* The standard of review the court found appropriate is to view the evidence in the light most favorable to the City, giving it the

The City specifically seeks to respond to the comments filed by Knology, Inc. in order to correct the distorted picture that Knology paints of the on-going franchise renewal negotiations between Knology and the City. Because the FCC is largely removed from the local cable franchising experience, the City considers it crucial to set the record straight in this instance so that the FCC can make an informed decision with regard to this matter.

I. INTRODUCTION AND SUMMARY

On March 5, 2007 the FCC adopted a *Report and Order*, in the above captioned proceeding, in which Commission placed limits on the cable franchising authority of local governments with respect to the review and granting of new cable franchises that are not otherwise regulated under applicable state law. At the same time, the FCC initiated the current *FNRM* to seek on whether these rules should be expanded to encompass renewal applications by existing cable franchisees.

In the guise of providing responsive comments to *FNPRM*, Knology Inc., a franchised cable operator in Huntsville, Alabama, which is currently in the middle of franchise renewal negotiation with the City, has used this proceeding to launch an unsubstantiated and entirely surprising attack on the City. In its comments, Knology portrays the City as making unreasonable demands and imposing unreasonable delays on the franchise renewal process and suggests that these actions on the part of the City are somehow depriving consumers of competitive

"benefit of all reasonable inferences," and only reverse if "reasonable minds could not come to a conclusion" other than that reached by the city. *Id.*

cable offerings and the full benefits of broadband. Knology's comments are disingenuous at best.

Before turning to address the litany of abuses that the City has allegedly committed during the franchise renewal process, it is useful to first understand the context of Knology's current cable franchise.

II. BACKGROUND

On January 23, 1986, the City of Huntsville granted a franchise (Ordinance No. 86-21) to Knology's predecessor in interest, Cable Alabama Corporation Cable TV Company ("Cable Alabama"), which provided for franchise fees of 5% of gross revenues of the provider. In that same year Comcast Cablevision of Huntsville, Inc. ("Comcast") succeeded to another existing cable franchise.

In or about 1991 Comcast and Cable Alabama sought the City's approval to transfer control of Cable Alabama to Comcast, thereby leaving Comcast as the sole cable provider in the City⁵. The City denied the request due primarily to the adverse impact that would result on competition in the cable market in the City. As a result of the denial, Cable Alabama brought suit against the City in federal court. The federal district court decided in favor of Cable Alabama finding in part that

⁵ In 1989 Bresnan Communications, Inc. entered into separate agreements with Comcast and Cable Alabama to purchase and combine their local cable systems, which the City disapproved in 1990. *Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484 (Fed. Dist Ct. N.D. Ala. 1991).

under the 1984 Cable Act the City could not prohibit the transfer, Cable Alabama Corp. v. City of Huntsville, 768 F. Supp. 1484 (Fed. Dist Ct. N.D. Ala. 1991).⁶

As a result of the *Cable Alabama* decision, the City and Cable Alabama reached a settlement which resulted in the City agreeing to pay to Cable Alabama or its assigns a certain portion of the fees received from any other operator of a cable system in the City; and agreeing to waive the franchise fees due under the existing franchise. In addition, the franchise was extended by 5 years to March 6, 2006. Thereafter, Cable Alabama did not transfer control to Comcast, which left Comcast as a competitor to Cable Alabama and thus under the requirements of the settlement agreement the City provided a portion of Comcast's franchise fees to Cable Alabama. Since the effective date of the settlement until March of 2006 the City has been obligated to pay to Cable Alabama and its successor Knology a portion of the franchise fees it has received from Comcast, which has amounted to millions of dollars. In addition, neither Cable Alabama nor its successor Knology has paid any franchise fees to the City for the applicable period.

On October 30, 1998, Knology acquired the assets of Cable Alabama, including the right to receive some or all of the results of the settlement with the City. In addition, Knology succeeded to the rights and responsibilities under the

⁶ In response to the *Cable Alabama* decision Congress amended the Cable Act to overturn the decision, which Congress criticized as "inconsistent with one of the major purposes of the Cable Act, which is to 'promote competition in cable communications. . . ." H.R. Rep. No. 102-628, at 91 (1992). In addition, the 1992 amendment also amended subsection 613(d) clarifying the right of a LFA to promote competition by denying a franchise if it would limit competitive cable service in the franchised area. *Id.*

existing franchise that were not affected by the court decision and resulting settlement. It is in the context of Knology's, knowingly, willingly and deliberately acquiring the Cable Alabama franchise and all of the benefits and obligations under it that Knology's allegations must be viewed.

III. KNOLOGY'S ALLEGATIONS OF CITY DEMANDS AND ABUSE ARE WITHOUT MERIT

A. There Has Been No Unreasonable Delay On The Part of the City

In its comments Knology bemoans the fact that it has “experienced considerable delay in franchise renewal” in Huntsville. (Knology at 6.) While Knology candidly acknowledges that it continues to serve customers in Huntsville and that the City has not sought the removal of Knology's facilities from the rights-of-way, it nevertheless suggests that the inability to renew in what it calls a “timely fashion” creates an uncertainty that can increase the cost of securing financing for broadband construction and upgrades. Based on this highly speculative harm, Knology argues that the FCC should require local franchising authorities (“LFAs”) to grant an “interim renewal” within four months of the date of request. Knology's argument is misplaced.

First, cable franchise renewal is governed under § 626 of the Cable Act, as amended,⁷ and those rules do not provide a guarantee of franchise renewal. In enacting the renewal provisions of the Cable Act, Congress made clear that these provisions are designed to protect the cable operator's interest in an orderly

⁷ Codified at 47 U.S.C. § 546.

franchise renewal process,⁸ but do not establish a presumption of automatic renewal in favor of the existing franchisee. As part of the federal cable renewal process, cable operators are required to provide written notice to the LFA of their desire to renew their franchise within the six-month window beginning three years before the franchise expires (from the 36th to the 30th month before the franchise expires).⁹ If the cable operator does not submit a notice of renewal, and the LFA does not independently invoke the federal renewal process during this period, the cable operator loses its rights under the federal rules to the renewal procedures of the Act.

As indicated in its comments, no such notice of renewal was given by Knology to the City. In fact, the City was the first to contact Knology about renewal and this was after the applicable initial six months renewal notification period. Yet, despite this admitted failure to avail itself of the federal renewal process, Knology now seeks to have the FCC unilaterally adopt additional rights that were not contemplated under the Cable Act.

Second, Knology has never advised the City of its need to complete the franchise negotiation within a set period of time, nor has it advised the City that the process of negotiations with the City was in any way adverse to Knology's interests. While the parties have met on several occasions, Knology has not actively

⁸ One of the stated purposes of the Cable Act is to “establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator’s past performance and proposal for future performance meet the standards established by this title.” 47 U.S.C. § 521(5).

⁹ 47 U.S.C. 546(a)(1).

tried to move the process forward. Since late 2005, Knology has been unresponsive to the City's request for clarification as to Knology's proposed plans for expansion, despite the fact that Knology is aware that such information is essential to the renewal process. In spite of not receiving the requested information, the City has attempted to move negotiations forward by contacting Knology to schedule a meeting on the issues and by providing a draft proposal of a master regulatory cable ordinance which attempts to provide a reasonable plan for expansion. Knology has not yet responded to the draft ordinance; and recent discussions have been largely unproductive due to Knology's unwillingness to engage in meaningful negotiations.

Third, as Knology itself admits, the City has in no way constrained its ability to continue to do business nor threatened to revoke any existing authority. Moreover, as discussed in more detail below, the City finds it curious that Knology would suggest that delays in renewal have somehow hindered its ability to buildout its network and make upgrades, given the fact that it is precisely Knology's refusal to provide such information on its planned network buildout and upgrades that has been one of the primary issues that has prevented the City from agreeing to a renewal agreement.

B. The City Has Not Imposed Unreasonable Build Out Requirements

Knology decries what it characterizes as the unreasonable buildout "demands" of the City of Huntsville. Knology indicates that the City seeks to require it to provide service to parts of the franchise area where it would be inordinately expensive to extend its network.

This is a distortion of the facts. First, in 1998 Knology succeeded to an existing cable franchise that provided for certain buildout of the existing cable system. From its entry into the Huntsville cable market until March of 2006 it has enjoyed the results of the 1991 settlement of the *Cable Alabama* case which included a waiver of franchise fees and a payment by the City to Knology of a portion of its competitors fees. During this period the City has not dictated the buildout of the system and Knology has been left to invest in expansion as its own plans dictate. As a result, there are significant areas of the City, according to the latest coverage information provided to the City by Knology in 2005, where Knology has failed or refused to serve.

Second, the City has not mandated any specific buildout requirements as a condition of renewal; nor does the City have unrealistic expectations with regard to the extent of the buildout. Rather, the City believes that it is incumbent upon the cable providers to outline their plans for future extension of their existing cable system to serve contiguous areas in which certain density requirements are met. The City would be more than willing to work out buildout plans that are reasonable. To this end, the City has on more than one occasion requested that Knology provide the City with its proposed construction plans and service models. Thus far, Knology has not brought forth any form of proposal for extending its initial service area other than to simply state that it will extend its services to where it is “economically feasible” to do so.

The City considers this standard to be too vague in terms of how Knology will actually extend its network to make its services available to additional areas of the City, and has repeatedly asked Knology to clarify or further define this standard. Thus far, Knology has ignored all such requests. In spite of this, the City has attempted to provide a reasonable solution to this issue in its draft ordinance, which Knology has yet to respond to.

This reluctance of Knology to provide anything but the vaguest of standards is especially problematic for the City given Knology's buildout practices to date. The City of Huntsville has experienced significant expansion over the last several years. As of the beginning of 2007, the total area of the city is 185.97 square miles and the population, based on 2006 Planning Division estimates, is 170,251. Knology's expansion, according to Knology's last information supplied to the City in 2005, has not kept pace with the growth of the City and instead has remained largely at the core of the City.

Included with this filing is a map illustrating the boundaries of the City of Huntsville and areas currently served by Knology.¹⁰ It is evident that there are significant developed areas of the City that are not served by Knology. These areas have not been identified in any way by Knology as areas for expansion to be included in discussions as part of the renewal process with the City of Huntsville.

¹⁰ Exhibit A contains a map of Huntsville and a depiction of the coverage area of Knology based on the most recent information furnished by Knology in 2005. The City believes that Knology has additional coverage area in two recent developments in the southwest portion of the City, but Knology has not updated information on its coverage area since 2005.

Apparently Knology has no intention to commit to expand its service area beyond that portion of the City to which it currently provides service. This position is untenable given the on-going expansion of the City.

In its comments Knology claims that its expansion has been hampered by rocky terrain and yet fails to explain why it has been unable to expand in other areas of the City that do not have such terrain, some of which are at or just above the floodplain. Moreover, Knology asserts that the incumbent cable operator, telephone provider, and electric utility, as monopoly providers in these inaccessible areas, jointly buried their facilities underground before Knology began the upgrading of its system. To set the record straight, the City has required common trenching in certain mountain slope areas since at least 1991. Knology and its predecessor Cable Alabama have, at all times since their entry into the local market, had equal access to subdivision developments as their competitor.

What Knology has not explained is that both it, its predecessor Cable Alabama, and its competitor, Comcast, have entered into exclusive arrangements with subdivision developers that allow the particular cable provider to access the subdivision during construction, before the rights-of-way and easements have become public assets, to the exclusion of the other provider. As a result, the excluded company has elected to come in after construction or elected not to serve a development at all. Such a practice is not acceptable to the City in the case of post-construction access since it degrades and damages the public infrastructure and disrupts homeowners and damages their property; nor in the case of non-service

since this eliminates competition in a given area. This practice appears to be a primary roadblock to expansion and the City is attempting to remedy this in the proposed master ordinance, which will require the cooperation of providers and developers to accomplish.

It is also important for the FCC to understand the City's intent in the renewal process. The City of Huntsville is undergoing rapid expansion both in terms of populations and geographic area. This expansion has resulted in the City needing to integrate its regulation of its existing providers – Comcast and Knology, and smaller cable systems operating in annexed areas, and an influx of new providers. The expansion of the City has not only resulted in numerous new developments in remote and under populated areas of the City that are not contiguous to the core area of the City currently served by either Knology or Comcast, but also in requests from developers as well as cable service operators to allow franchising to serve those areas. In addition, the City has been attempting to balance its local regulatory requirements with a level playing field provision in the current Comcast franchise against the federal Cable Act general franchise requirements applicable to the awarding of a franchise by a local franchising authority which provides “in awarding a franchise, the franchising authority – shall allow the applicant's cable system a reasonable period of time to become capable of providing service to all households in the franchise area.”¹¹ In an effort to provide fairness, an opportunity for competitive services, service to remote areas of the City,

¹¹ 47 U.S.C. § 541(a)(4)(B).

and mechanisms to ensure that existing providers serve areas that have now become annexed to the City; the City is developing a master ordinance applicable to cable services that will provide uniformity in rules and requirements of the City and reasonable buildout requirements, while at the same time allowing for distinctions for varying circumstances and conditions and an opportunity in cases such as Knology to develop a mutually agreeable expansion plan for its services.

For example, the City is considering incorporation of a buildout standard that was recently utilized in the State of Virginia, VA. Code § 15.2-2108.2. That legislation was the result of a compromise between the cable industry and the telecommunications industry and provides a reasonable time for completion of construction or buildout of a cable system, consistent with the federal Cable Act general franchise requirements referenced above, and based on differing percentages of buildout over a period of years as long as ten years, and was specifically endorsed by the FCC in its *Report and Order* at fn. 2.

It is not clear from its comments whether it is the draft master ordinance that Knology is objecting to and characterizing as an unreasonable buildout demand on the part of the City. If so, this is not correct and highly misleading. The master ordinance is simply a work in process which the City is seeking to develop through coordination and work with all stakeholders in the City. The City has specifically solicited comments from Knology as part of its process of development of the ordinance. To date, Knology has not provided constructive feedback on the draft.

C. Franchise Fees and Other Services

Knology claims that the City is making franchise renewal contingent upon “unreasonable demands” for free services and capabilities. In support of this contention, Knology states that the City of Huntsville has

[D]emanded that Knology construct free network connections and provide free cable television service to numerous city buildings, schools, libraries, fire stations, and other organizations. It is particularly unreasonable, though, that these LFAs also demand that Knology construct free network connections and provide free cable service to non-municipal facilities, such as a religious school and the American Red Cross.

Knology, at 11. The City is perplexed by Knology’s statement. While it is true that Appendix C of the draft renewal franchise would obligate Knology to provide connections and free service to the list of organizations that Knology cites; the list, however, was provided by Knology as part of the October 20, 2005 draft renewal franchise that Knology presented to the City. Thus, far from being demands of the City, these are service obligations that Knology has itself provided to the City.

Further, the Cable Act specifically contemplates, and cable operators routinely provide, drops and services and institutional network capabilities connecting governmental, educational and non-profit organization services as part of negotiated cable franchise renewal.

IV. Conclusion

In conclusion, the City reiterates that the filing and comments of Knology represent an unfair and distorted view of the on-going franchise renewal

negotiations and should not be relied upon by the FCC as it moves forward with the pending rulemaking proceeding.

Rules and procedures for franchise renewal negotiations are currently set out under § 626 of the federal Cable Act. There is nothing to suggest that the existing rules need to be revised, as they do not unduly delay or hamper the rights of Knology or other incumbent cable operators.

Despite the City's surprise and disappointment at Knology's filing, the City continues to stand ready to work with Knology to develop a fair and reasonable renewal franchise that will meet the business needs of Knology while at the same time meeting the current and future cable-related needs of the City of Huntsville as reasonably determined by the City.

Respectfully submitted,

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Exhibit A

(Map of Huntsville and Depiction of Knology's Coverage Area)